

# The Influence of the Uniform Probate Code in Nonadopting States

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## I. INTRODUCTION

Since its emergence in 1969, the Uniform Probate Code<sup>1</sup> (UPC) has attracted considerable attention. Scholars have offered extensive commentary,<sup>2</sup> and legislatures in fourteen states have adopted it.<sup>3</sup> For a variety of reasons, however, thirty-seven other jurisdictions (including the District of Columbia) have not adopted the statute. This Article examines how the UPC has influenced the law and its practice in those places. A survey<sup>4</sup> of statutes and cases suggests that the UPC is a viable

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1. UNIF. PROB. CODE, 8 U.L.A. 1 (1983).

2. See, e.g., Emery, *The Utah Uniform Probate Code—Protection of the Surviving Spouse—The Elective Share*, 1976 UTAH L. REV. 771; Ingram & Rudolph-Boevers, *The Uniform Probate Code and the Federal Estate Tax Marital Deduction*, 1976 UTAH L. REV. 819; Johnson, *Joint, Totten Trust, and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973); Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977); Lilly, *The Uniform Probate Code and Oklahoma Law: A Comparison* (pts. 1 & 2), 8 TULSA L.J. 159 (1972), 9 TULSA L.J. 1 (1973); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970); Comment, *Surviving Spouses—Uniform Probate Code Versus Pennsylvania's Probate, Estates and Fiduciaries Code*, 11 DUQ. L. REV. 576 (1973).

3. The states are: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. UNIF. PROB. CODE, 8 U.L.A. 1 (1983).

4. A word on methodology may be useful. The statutory survey encompassed the statutes of every state that is not listed in *Uniform Laws Annotated* as having adopted virtually all of the Uniform Probate Code (UPC). When a statute based on the UPC was identified, it was classified as belonging in one of four categories: (1) same as UPC; (2) same as UPC except for small changes (e.g., use of "conservator" instead of "guardian"); (3) similar to UPC (much of the thrust of UPC retained, but with significant word changes); or (4) derived from the UPC (if legislative history indicates derivation). Because the totals in each category proved so small, all categories have been combined

but underutilized source of law reform and legal argument.

In twenty-three states, legislative unwillingness to embrace the UPC as a whole has not precluded adoption of some of its provisions.<sup>5</sup> As the first part of this Article indicates, the most common pattern is for a state to use the Code as a model to solve an isolated, but common, problem. Article II of the UPC, which covers intestacy and wills, is by far the most often copied article; the most often followed sections are those dealing with traditional troublespots, such as the effects of survival, adoption, and divorce.<sup>6</sup> In contrast, among those UPC sections garnering the least attention are those proposing controversial reforms, such as the installation of a system for informal probate.<sup>7</sup> Many jurisdictions that have rejected the Code nonetheless have benefited from its use as a model for solving particular problems.

The UPC has also been useful to courts seeking solutions to common-law and statutory construction problems. Part III of this Article suggests that judicial willingness to follow the UPC position on a particular point parallels the legislative pattern of

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for the purpose of discussion in the text and display in the tables. Generally these statutes are referred to in the text as "based on" the UPC, without further elaboration.

Despite careful examination, the breadth and complexity of the project make it possible that some statutes based on the UPC have not been identified. An isolated provision placed in an odd part of a particular state's code may have been missed. A statute may have been "drawn from" the UPC, but without language sufficiently similar to show the connection. See *In re Jones*, 379 Mass. 826, 833 n.10, 401 N.E.2d 351, 356-57 n.10 (1980). A legislature may have compared the UPC to its statute and concluded that both accomplished the same thing. See *Green v. Potter*, 51 N.Y.2d 627, 416 N.E.2d 1030, 435 N.Y.S.2d 695, (1980). A statute may be "twice removed" from the UPC, based on one state's statute that was, in turn, based on the UPC; by the time two legislatures had reworded the provision, it may not have been sufficiently like the UPC to be recognizable. To the extent that error exists in the statutory survey, the survey understates the impact of the UPC.

The use of full-text computerized searches of reported opinions means that virtually all cases citing the UPC should have been identified. Even here, however, the possibility for understatement exists: a court may have been influenced by the UPC, yet not have cited it.

Finally, of course, the study is subject to later developments. The statutory survey was conducted primarily during the summer of 1983; the case survey during late 1983 and early 1984. References to Washington law are current to late 1984. Despite the possibility that a particular statute or case may have been missed, the survey should be valuable as an indicator of trends.

5. See *supra* note 4. Because the Uniform Testamentary Additions to Trusts Act was widely adopted before the UPC incorporated its provisions as § 2-511, states that have adopted only the UNIFORM TESTAMENTARY ADDITION TO TRUSTS ACT, 8A U.L.A. 599 (1983), are not included in the category of "swing" states that adopted some UPC provisions. See also *infra* note 11.

6. See *infra* note 12 and accompanying text.

7. See *infra* Table II pp. 606-07.

applying the UPC to common troublespots. In addition, this part of the Article discusses the ways advocates have used the UPC both as respected secondary authority and as an aid to the interpretation of particular state statutes. The Code's potential as a source of authority is now established but largely untapped.

Because many readers of this journal have a particular interest in Washington law, part IV of this Article briefly applies to Washington the lessons of this Article's first parts. Some areas ripe for legislative reform are identified, and examples are given illustrating how Washington advocates might tap the UPC as a source of argument.

## II. PIECEMEAL STATUTORY REFORM

The primary purpose of the UPC is to serve as a device for achieving statutory reform. One measure of the strength of the Code is the extent to which "swing" states, those that have adopted some UPC sections, have used it as a model for their own statutes. This part of the Article examines the extent to which the swing states have followed the Code. With the exception of the Rocky Mountain states, where six of seven have adopted the UPC,<sup>8</sup> there is no particular geographic pattern to those states that have adopted some UPC provisions or to those that have not adopted any. Vermont, Georgia, Texas, and Iowa have each followed the UPC on some occasions.<sup>9</sup> On the other hand, no direct evidence was found in Rhode Island, South Carolina, Oklahoma, or Wisconsin that the UPC has been used as a source of statutes. Local, rather than regional, considerations appear to have affected the extent to which the UPC has been a model.

Support for the UPC, as measured by the presence of statutes that track it, varies among the swing states. However, all except New Jersey<sup>10</sup> have used it as a model to solve particular problems, rather than as a means to accomplish more wide-ranging reform. These jurisdictions are in effect saying, "We'll follow

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8. Arizona, Colorado, Idaho, Montana, New Mexico, and Utah have adopted the Code; only Wyoming has not, although it has adopted some provisions. ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (1975); COLO. REV. STAT. §§ 15-10-101 to -17-101 (1973); IDAHO CODE §§ 15-1-101 to -7-307 (1979); MONT. CODE ANN. §§ 72-1-101 to -5-502 (1980); N.M. STAT. ANN. §§ 45-1-101 to -7-401 (1978); UTAH CODE ANN. §§ 75-1-101 to -8-101 (1978).

9. See *infra* Tables I & II pp. 604-07.

10. New Jersey has adopted substantial parts of several UPC articles. See N.J. STAT. ANN. §§ 3B:10-23 to -30, :23-7 to -10, :14-25 to -28 (West 1983).

the UPC's view on advancements of an intestate share," instead of, "We like the UPC's approach to intestacy." Those sections of the Code with the greatest following address topics that have traditionally posed serious problems for courts. In addition, the UPC's more controversial proposals have largely fallen flat in swing states.

A look at UPC article II, excluding section 2-511,<sup>11</sup> reveals some interesting patterns. Article II has broad but thin appeal; virtually every section has been followed in a few states, but no section has attracted the support of more than six states. Table I identifies those article II provisions that have been followed most often in the swing states. Article II has been used most consistently as a source of solutions to common troublespots. A list of the most popular topics reads like a litany of traditional problems in intestate succession and wills: survival, adoption, nonmarital children, advancements, and the effect of divorce. The UPC's approach to these subjects has been followed by at least four states.<sup>12</sup>

Somewhat surprisingly, states that follow the UPC in one area do not necessarily follow it in a related one.<sup>13</sup> For example, six swing states have provisions patterned on the section 2-104 rule that an intestate heir must survive the decedent by 120 hours in order to take.<sup>14</sup> Only three of those states, however, adopted the parallel provision for wills.<sup>15</sup> Similarly, six states follow the section 2-110 approach and require a writing in order to establish that a gift is to be treated as an advancement of the donee's intestate share.<sup>16</sup> Only three of these states follow parallel section 2-612, which requires a writing to establish that an inter vivos gift was meant to be in satisfaction of a gift by will.<sup>17</sup>

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11. Section 2-511 of the UPC is § 1 of the Uniform Testamentary Addition to Trusts Act. See UNIF. PROB. CODE § 2-511 comment, 8 U.L.A. 126 (1983). Because the older act was widely adopted prior to promulgation of the UPC, states that have adopted only the older act are not included in the category of swing states. See *supra* note 5. For a list of states that have adopted UPC § 2-511, see UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT, 8A U.L.A. 599 (1983).

12. See *infra* Table I pp. 604-05.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Perhaps a difference in substance between the sections contributed to the result noted. Under UPC § 2-110, the issue of a predeceased heir who received an advancement are not "burdened" by it when the shares of the issue are calculated. On the other hand, the issue of a predeceased beneficiary whose gift has been adeemed by satisfaction will

Although a variety of possible explanations for the failure to pair related sections can be advanced, these results suggest that legislators examining the UPC as a model to solve particular problems might benefit from a general perusal of the statute, looking for related topics.

Table II demonstrates that support for sections outside of article II has been considerably more spotty; only rarely have more than two jurisdictions adopted any particular provision. Two short articles have received some attention: article IV on ancillary administration and article VI on multiple-party and payable-on-death accounts have each been substantially followed in four states. Again, what limited use has been made of the UPC as a model statute has been to solve traditional problems.

A statutory review also reveals some interesting gaps. In areas in which the UPC has proposed substantial reforms, it has not gained adherents in the swing states. Article III's streamlined approach to probate administration was expected to raise substantial opposition.<sup>18</sup> Only about one-third of article III's 150 sections have been adopted in any of the states; no section has been adopted in more than three states.<sup>19</sup> Furthermore, only twelve of the twenty-three swing states have adopted any of article III.<sup>20</sup> The UPC's article III, part 3, proposals for informal probate and succession without administration have gone without a single swing state supporter. Only three states have looked to the article for solutions to a set of administrative problems, rather than for an isolated section.<sup>21</sup>

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be "burdened" if the issue take under the anti-lapse statute. See UNIF. PROB. CODE §§ 2-110, -605, -612 comment, 8 U.L.A. 69, 144, 153 (1983).

18. See, e.g., Crapo, *The Uniform Probate Code—It Still Works in Idaho*, 1979 B.Y.U. L. REV. 343, 359-60; Wellman & Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments*, 1976 ARIZ. ST. L.J. 477, 478-85; Comment, *Articles II and III of the Uniform Probate Code as Enacted in Utah*, 1976 B.Y.U. L. REV. 425, 445-54.

19. See *supra* note 4; *infra* note 20.

20. See, e.g., ALA. CODE § 43-8-76 (1982); ARK. STAT. ANN. § 62-2203.1 (Supp. 1983); KY. REV. STAT. § 395.195 (1984); MO. ANN. STAT. § 473.793 (Vernon Supp. 1984); N.J. STAT. ANN. § 3B:3-19 (West 1983); N.C. GEN. STAT. § 28A-13-1 (Supp. 1984); OR. REV. STAT. § 114.225 (1981); PA. STAT. ANN. tit. 20, § 3376 (Purdon 1975); S.D. CODIFIED LAWS ANN. § 29-2-5 (Supp. 1984); VT. STAT. ANN. tit. 14, § 1051 (Supp. 1984); VA. CODE § 64.1-132.2, -132.3 (Supp. 1984); WYO. STAT. § 2-7-705 (1980).

21. New Jersey has adopted many of the provisions on powers and duties of the personal representative, N.J. STAT. ANN. §§ 3B:10-19 to -23, :10-27 to -32, :14-35 to -37 (West 1983), some of the provisions on creditors' claims, N.J. STAT. ANN. §§ 3B:22-1, -2,

TABLE I

## Article II Provisions Popular in Swing States

	2-104 Survival (Intestacy)	2-109 Nonmarital & Adopted Children	2-110 Advancements	2-508 Revocation by Divorce	2-701 Contracts	2-601 Survival (Will)	2-612 Ademption by Satisfaction
Ala.	ALA. CODE § 43-8-43 (1982)	ALA. CODE § 43-8-48 (1982)	ALA. CODE § 43-8-49 (1982)	ALA. CODE § 43-8-137 (1982)	ALA. CODE § 43-8-250 (1982)	ALA. CODE § 43-8-220 (1982)	ALA. CODE § 43-8-231 (1982)
Ark.			ARK. STAT. ANN. § 61- 153 (1971)		ARK. STAT. ANN. § 60- 412 (Supp. 1983)		
Cal.							
Del.	DEL. CODE ANN. tit. 12, § 504 (1979)	DEL. CODE ANN. tit. 12, § 508 (1979)	DEL. CODE ANN. tit. 12, § 509 (1979)				
Ga.							
Ind.							
Iowa							
Ky.				KY. REV. STAT. § 394.092 (1984)	KY. REV. STAT. § 394.540 (1984)		
Mass.				MASS. GEN. LAWS ANN. ch. 191, § 9 (West Supp. 1984-1985)			
Mo.	MO. ANN. STAT. § 474.015 (Vernon Supp. 1985)	MO. ANN. STAT. § 474.060 (Vernon Supp. 1985)	MO. ANN. STAT. § 474.090 (Vernon Supp. 1985)			MO. ANN. STAT. § 474.455 (Vernon Supp. 1985)	MO. ANN. STAT. § 474.425 (Vernon Supp. 1985)
N.H.							
N.J.	N.J. STAT. ANN. § 3B:5-1 (West 1983)	N.J. STAT. ANN. § 3B:5-9 to -10 (West 1983)	N.J. STAT. ANN. § 3B:5-13 (West 1983)	N.J. STAT. ANN. § 3B:3-14 (West 1983)		N.J. STAT. ANN. § 3B:3-32 (West 1983)	N.J. STAT. ANN. § 3B:3-46 (West 1983)

TABLE I (cont'd)

Article II Provisions Popular in Swing States					
	2-104 Survival (Intestacy)	2-109 Nonmarital & Adopted Children	2-110 Advancements	2-508 Revocation by Divorce	2-701 Contracts
N.C.					
Ohio					
Ore.					
Pa.	20 PA. CONS. STAT. ANN. § 2104(10) (Purdon Supp. 1984- 1985)		20 PA. CONS. STAT. ANN. § 2109.1 (Purdon Supp. 1984-1985)		
S.D.					
Tenn.		TENN. CODE ANN. § 31-2-105 (1984)			TENN. CODE ANN. § 32-3-107 (1984)
Texas					
Vt.					
Va.		VA. CODE § 64.1-5.1 (1980)			
Wash.					
Wyo.					
					2-601 Survival (Will)
					2-612 Ademption by Satisfaction

TABLE II

## Swing State Statutes Drawn from Articles IV-VII

	Article 4 Ancillary Administration	Article 5 Protecting Disabled Persons	Article 6 Multiple Party & POD Accounts	Article 7 Trust Administration
Ala.				
Ark.	ARK. STAT. ANN. § 62-3110 (Supp. 1983)			
Cal.				
Del.	DEL. CODE ANN. tit. 12, §§ 1561-1571 (1979)			
Ga.			GA. CODE ANN. §§ 7-1-810 to -813, -815 to -821 (Harrison 1981)	
Ind.	IND. CODE ANN. §§ 29-2-1-9 to -2-1-12 (Burns Supp. 1984)		IND. CODE ANN. §§ 32-4-1.5-1 to -4-1.5-14 (Burns 1980)	
Iowa		IOWA CODE ANN. §§ 633.705-.706 (Supp. 1984-1985)		
Ky.			KY. REV. STAT. §§ 391.300, .305 (1984)	KY. REV. STAT. §§ 386.655 -.735 (1984)
Mass.	MASS. GEN. LAWS ANN. ch. 199, §§ 1-9, 11-12 (West 1958 & Supp. 1984)			
Mo.	MO. ANN. STAT. §§ 473.678, .685, .687, .689 (Vernon Supp. 1985)			
N.H.				
N.J.	N.J. STAT. ANN. §§ 3B:14-25 to -30, -43, -49 to -51 (West 1983)	N.J. STAT. ANN. §§ 3B:12-6 to -10, -39, -42, -51 to -52, -56 to -57, -62 (West 1983)		N.J. STAT. ANN. § 3B:10-26 (West 1983)
N.C.				



TABLE II (cont'd)				
Swing State Statutes Drawn from Articles IV-VII				
	Article 4 Ancillary Administration	Article 5 Protecting Disabled Persons	Article 6 Multiple Party & POD Accounts	Article 7 Trust Administration
Ohio				
Ore.		(a)		
Pa.		20 PA. CONS. STAT. ANN. tit. 20, § 5536 (Purdon Supp. 1984-1985)		
S.D.				
Tenn.				
Texas		TEX. PROB. CODE ANN. § 36A (Vernon 1971)	TEX. PROB. CODE ANN. §§ 436 -442, 444-450 (Vernon)	
Vt.		Vt. STAT. ANN. tit. 14, §§ 3051 -3052 (Supp. 1984)		
Va.			VA. CODE §§ 6.1-125.1 to -125.3, -125.5 to -125.14 (1983)	
Wash.				
Wyo.	(a) OR. REV. STAT. §§ 125.060-.065, .071, .075-.100, .103, .107, .113, .123, .137, .157, .163, .167, .193, .267, .273, .297, .303, .307, .313, .317, .323, .333, .337, .342, .347, .353, .383, .387, .397, .413 (1973)			

Support for article VII's proposals on trust administration has been even lower; only Kentucky<sup>22</sup> has enacted more than one section. Similarly, only Oregon has adopted more than one of the guardianship proposals in article V.<sup>23</sup> The same lack of support is evident for the UPC's proposal allowing a surviving spouse to elect against a will and take a share of an "augmented estate."<sup>24</sup> Only two of the twenty-three swing states have followed the UPC's lead on this question.<sup>25</sup> Perhaps the movement for more equal treatment of spouses has stalled, or perhaps the problem of disinheritance is more theoretical than real.<sup>26</sup> In any event, the augmented estate is another reform that has not spread beyond the states that have adopted the UPC. The pattern of nonsupport for controversial reforms suggests that these proposals will seldom be adopted piecemeal. They have been accepted only when buttressed by the argument that controversial reforms should be accepted because the statute should be taken as a whole.

As a model statute, the UPC has been helpful to jurisdictions that have chosen not to adopt the whole. The Code offers sensible solutions to traditional problems; gaps of one sort or another can be filled in local statutes. While thorough or controversial reform of one area of the law of wills might be achieved

-19 to -21, :23-42, :14-31 to -34 (West 1983), and most of the provisions dealing with practical problems of distribution of estates, N.J. STAT. ANN. §§ 3B:22-19 to -21, :23-1 to -15, :23-42 to -43 (West 1983). Vermont has followed the UPC regarding creditors' claims, VT. STAT. ANN. tit. 14, §§ 1202-1212, 1214-1216 (Supp. 1984). Missouri has adopted a few of the models regarding inventory of an estate, MO. ANN. STAT. §§ 473.793, .797(1), .800 (Vernon Supp. 1985).

22. KY. REV. STAT. §§ 386.655-.735 (1984).

23. See, e.g., OR. REV. STAT. §§ 126.060-.100, .267, .273, .297, .337-.353, .413 (1981). Article V's provisions came later than those of most of the rest of the Code, originally approved in 1969. Part 5 of art. V was amended in 1979 to incorporate the Uniform Durable Power of Attorney Act. Parts 1, 2, 3, and 4 were amended in 1982 to incorporate the Uniform Guardianship and Protective Proceedings Act. See 8 U.L.A. 2-3 (1983).

24. See UNIF. PROB. CODE §§ 2-201 to -203, 8 U.L.A. 74-82 (1983). For a comprehensive analysis, see Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

25. N.J. STAT. ANN. § 3B:8-2 (West 1983); S.D. CODIFIED LAWS ANN. § 30-5A-1 (Supp. 1984).

26. See, e.g., Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 715 (1966) ("The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss."); Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 316-17 (1975) ("There was virtually no indication that spouses of either sex used dispositive instruments to deprive the surviving spouse of the property the couple had accumulated during the marriage.").

without adopting the entire statute, the pattern followed so far suggests that such a result is unlikely. However, persons seeking a statutory solution should carefully examine the Code's solution to their problem and recognize that twenty-three other jurisdictions have found it useful to follow the UPC in some circumstances.

### III. THE UPC IN THE COURTS

Another measure of the influence of the UPC is the nature of its use by courts. A review<sup>27</sup> of more than fifty cases from non-UPC jurisdictions suggests UPC sections that legislators ought to consider and demonstrates how advocates might effectively use the Code. While measuring the "popularity" of a UPC section by the number of times it is cited is a risky business,<sup>28</sup> some conclusions can be drawn from the willingness of different courts to consult the same UPC sections. In addition, this part of the Article analyzes the two primary ways in which advocates have used the UPC: as secondary authority in a manner similar to the restatements and as an aid to interpreting legislative history in jurisdictions that have considered specific UPC provisions.

#### A. *Statutory Reform Revisited*

Persons interested in statutory reform can look to judicial decisions for guidance regarding which areas need reform and what shape the reforms might take. Judicial decisions citing the UPC are instructive on both grounds. Judicial opinions can illustrate that clearer or more complete legislation on a particular point might have obviated the need for litigation. Furthermore, judicial adoption of a UPC approach should carry weight with a legislature that is considering options. Despite the small number of relevant cases, some UPC sections stand out as having attracted judicial attention and, thus, deserving of legislative attention as well.

UPC section 2-508 addresses the effect of divorce on the will

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27. See *supra* note 4 for an explanation of research methods used for this Article.

28. Whether a court has occasion to cite the UPC is determined by a wide variety of factors: which controversies are litigated and which of those are appealed, whether lawyers for any party think to use the UPC, and whether a court in a non-UPC state is persuaded that a citation is relevant.

of a divorced party.<sup>29</sup> The clarity and completeness of its coverage have commended it to several legislatures in non-UPC states.<sup>30</sup> In addition, several courts have expressed their satisfaction with the Code's solution to a set of traditionally vexing problems. As early as 1970, in *First Church of Christ, Scientist v. Watson*,<sup>31</sup> the Alabama Supreme Court utilized the then-new UPC to support the court's interpretation of Alabama's statute. In *First Church*, the testator had given all of his property to his wife, provided she survived him by thirty days, and if not, to the plaintiff. The couple divorced and the wife survived. The statute then in force treated the provision for the wife as revoked. Unanswered was whether the plaintiff could take, since the precondition to taking (nonsurvival by the wife) had not been met. The court quoted from and followed UPC section 2-508, under which property that would have passed to the former spouse passes as if the former spouse had not survived the decedent.<sup>32</sup> Other courts have followed the same path.<sup>33</sup> Perhaps in recognition that similar litigation could be avoided, Alabama eventually adopted section 2-508.<sup>34</sup>

29. UNIF. PROB. CODE § 2-508, 8 U.L.A. 122 (1983) provides:

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b) [defining the effect of a divorce, annulment, or decree of separation]. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

30. See *supra* Table I pp. 604-05.

31. 286 Ala. 270, 239 So. 2d 194 (1970).

32. *Id.* at 273, 239 So. 2d at 196 ("While our statute does not contain all of the provisions of § 2-508 of the Uniform Probate Code, we think that property which is prevented from passing to the former spouse because of revocation by divorce should pass as if the former spouse failed to survive the decedent . . .").

33. See *Steele v. Chase*, 151 Ind. App. 600, 605, 281 N.E.2d 137, 140 (1972); *Russell v. Estate of Russell*, 216 Kan. 730, 733, 534 P.2d 261, 264-65 (1975); *Calloway v. Estate of Gasser*, 558 S.W.2d 571, 575-76 (Tex. Civ. App. 1977).

34. See ALA. CODE § 43-8-137 (1982).

The comprehensiveness of UPC section 2-508 also came to the aid of the Texas Court of Civil Appeals. In *Smith v. Smith*,<sup>35</sup> the testator had left all of his property to his wife; later, the couple divorced and then remarried each other. The Texas statute followed the usual approach of revoking provisions in favor of a divorced spouse but made no mention of the effect of remarriage. Under section 2-508, will provisions revoked by the section at divorce are revived by remarriage.<sup>36</sup> Following the UPC approach, the court called the UPC drafters "distinguished legal scholars" and concluded that "their determination of sound legislative policy confirms our conclusion that the construction we have given [the Texas statute] is in accordance with the legislative intent."<sup>37</sup>

Courts have also looked to the UPC for guidance in solving the oft-litigated problems of joint and survivorship bank accounts. The Supreme Court of Ohio, in a dispute between the surviving husband (and joint depositor) and the estate of his wife,<sup>38</sup> went so far as to "adopt"<sup>39</sup> sections 6-103(a) and 6-104(a), which establish presumptions about the ownership of such accounts. Furthermore, an appellate court in Texas cited section 6-104(a) as authority for its decision to admit parol evidence to show that the express terms of a bank account did not reflect the depositor's intention.<sup>40</sup> In another dispute over the effect of joint ownership, the Massachusetts Supreme Judicial Court cited with approval the Code's policy of recognizing will substitutes despite their noncompliance with the statute of wills.<sup>41</sup> Again, judicial willingness to follow the UPC's lead on traditionally troublesome questions should suggest to legislatures that they might save the courts trouble by adopting the provisions themselves.

One might not expect courts to look to a model statute for

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35. 519 S.W.2d 152 (Tex. Civ. App. 1974).

36. See *supra* note 29.

37. *Smith*, 519 S.W.2d at 155.

38. *Estate of Thompson v. Botts*, 20 Ohio Op. 3d 371, 423 N.E.2d 90 (1981).

39. *Id.* at 374-75, 423 N.E.2d at 94 ("We hold that the presumptions created in these two sections accurately reflect the common experiences of mankind in regard to joint and survivorship accounts. As a result, we adopt these specific sections as the law of this state.").

40. *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex. Civ. App. 1979).

41. *Blanchette v. Blanchette*, 362 Mass. 518, 526, 287 N.E.2d 459, 464 (1972) (quoting the comment to UPC § 6-201 to the effect that "the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize").

answers to procedural questions, about which there is often a local bias. However, courts in four jurisdictions have cited with approval the UPC's approach to handling creditors' claims.<sup>42</sup> The approach of an Illinois appellate court is particularly interesting.<sup>43</sup> In a style similar to the Ohio Supreme Court's "adoption" of joint bank account provisions,<sup>44</sup> the Illinois court virtually read the UPC definition of "claims" into the Illinois statute.<sup>45</sup> States not willing to adopt the UPC's thorough procedural reforms might nonetheless benefit from following the UPC on narrower questions, such as how to handle creditors' claims.

At least in these three areas—effect of divorce, joint accounts, and creditors' claims—several courts have been willing to follow and even expressly "adopt" the UPC approach, despite the absence of legislative action.<sup>46</sup> This judicial activism suggests that these areas are appropriate places on which to focus piecemeal statutory reform.

## *B. A Source for Advocates*

### *1. The UPC as Secondary Authority*

As earlier discussion has demonstrated, the UPC has often

42. *Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 612, 325 N.E.2d 444, 446 (1975) (citing UPC § 1-201(4) in holding: "'The term [claims] does not include . . . disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate.'"); *Lunderville v. Morse*, 112 N.H. 6, 9, 287 A.2d 612, 614 (1972) (citing UPC §§ 3-801 to -804 in suit by creditor against executors; executor of creditor's estate had informed executor of debtor's estate that creditor's niece held an unsigned note of debtor; this action supplied sufficient notice to comply with nonclaim statute); *Belancsik v. Overlake Memorial Hosp.*, 80 Wash. 2d 111, 116, 492 P.2d 219, 222 (1971) (citing UPC § 3-803, which subjects estates protected by insurance to a potentially longer period of liability); *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 332 n.8, 260 N.W.2d 680, 685 n.8 (1978) (citing UPC §§ 3-803(c)(1), -812, -814, to substantiate the statement that "[a] secured creditor retains his rights in any security in spite of failure to file").

43. *See Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 325 N.E.2d 444 (1975).

44. *See supra* text accompanying note 38.

45. The court quoted UPC § 1-201(4) and then concluded: "Therefore petitioner's instant action is not a claim and is not subject to the limitations of [the Illinois statute]." *Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 612, 325 N.E.2d 444, 446 (1975).

46. *See also Gedlen v. Safran*, 102 Wis. 2d 79, 89-90, 306 N.W.2d 27, 32 (1981), and *California-Western States Life Ins. Co. v. Sanford*, 515 F. Supp. 524, 532 (E.D. La. 1981), which followed the approach of UPC § 2-803 regarding the right of someone who might benefit from committing a homicide. *But see State ex rel. Miller v. Sencindiver*, 275 S.E.2d 10, 12 (W. Va. 1981) (citing UPC § 2-803, but leaving adoption of the rule to the legislature).

been cited as secondary authority for the position taken by a particular court. At this level, the Code has been well received. Of thirty-eight cases citing the UPC in a context unrelated to the analysis of the legislative history of a local statute, only four rejected the position proposed by the Code.<sup>47</sup> This part of the Article examines how advocates have used the Code in various situations.

One clear lesson from the cases is that lawyers can use the UPC effectively, much as they might use a treatise or restate-

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47. The following UPC sections have been cited with approval: UPC § 1-201(4) as cited in *Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 612, 325 N.E.2d 444, 446 (1975). UPC § 1-201(20) as cited in *Allan v. Allan*, 236 Ga. 199, 206 n.2, 223 S.E.2d 445, 451 n.2 (1976). UPC § 1-401(a)(3) as cited in *Oakley v. Anderson*, 235 Ga. 607, 610, 221 S.E.2d 31, 34 (1975). UPC § 2-107 as cited in *Warpool v. Floyd*, 524 S.W.2d 247, 249 (Tenn. 1975). UPC § 2-109 as cited in *Thom v. Bailey*, 257 Or. 572, 600 n.38, 481 P.2d 355, 368 n.38 (1971). UPC § 2-205 as cited in *Love v. Pogue*, 650 S.W.2d 346, 360 (Mo. 1983). UPC § 2-503 as cited in *Heckel v. Gilfillan*, 60 Cal. App. 3d 975, 981 n.2, 131 Cal. Rptr. 841, 844 n.2 (1976). UPC § 2-505 as cited in *Rogers v. Helmes*, 23 Ohio Op. 3d 301, 305 n.10, 432 N.E.2d 186, 190 n.10 (1982). UPC § 2-508 as cited in *First Church of Christ, Scientist v. Watson*, 286 Ala. 270, 273, 239 So. 2d 194, 196 (1970); *Steele v. Chase*, 151 Ind. App. 600, 605, 281 N.E.2d 137, 140 (1972); *Russell v. Estate of Russell*, 216 Kan. 730, 733, 534 P.2d 261, 264 (1975); *Calloway v. Estate of Gasser*, 558 S.W.2d 571, 576 (Tex. Civ. App. 1977); *Smith v. Smith*, 519 S.W.2d 152, 155 (Tex. Civ. App. 1974). UPC § 2-606(b) as cited in *In re Estate of Leavy*, 122 N.H. 184, 185-86, 442 A.2d 588, 589 (1982); *In re Frolich Estate*, 112 N.H. 320, 326, 295 A.2d 448, 452 (1972). UPC § 2-608 as cited in *Graham v. Home State Bank*, 216 Kan. 770, 775, 533 P.2d 1318, 1322 (1975). UPC § 2-610 as cited in *Leidy Chem. Found., Inc. v. First Nat'l Bank*, 276 Md. 689, 697, 351 A.2d 129, 133 (1976). UPC § 2-801 as cited in *In re Estate of Mixter*, 83 Misc. 2d 290, 294, 372 N.Y.S.2d 296, 302 (N.Y. Surr. Ct. 1975). UPC § 2-803 as cited in *Gedlen v. Safran*, 102 Wis. 2d 79, 89-90, 306 N.W.2d 27, 32 (1981). UPC § 2-803(e) as cited in *California-Western States Life Ins. Co. v. Sanford*, 515 F. Supp. 524, 532 (E.D. La. 1981). UPC § 3-706 as cited in *Seattle-First Nat'l Bank v. Marshall*, 16 Wash. App. 503, 510, 557 P.2d 352, 356 (1976). UPC §§ 3-801 to -804 as cited in *Lunderville v. Morse*, 112 N.H. 6, 9, 287 A.2d 612, 614 (1972). UPC § 3-803 as cited in *Belancsik v. Overlake Memorial Hosp.*, 80 Wash. 2d 111, 116, 492 P.2d 219, 222 (1971). UPC §§ 3-803(c)(1), -812, -814 as cited in *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 332 n.8, 260 N.W.2d 680, 685 n.8 (1978). UPC § 3-814 as cited in *Caruthers v. Buscher*, 38 Md. App. 661, 671 n.9, 382 A.2d 608, 614 n.9 (1978). UPC § 5-408(3) as cited in *In re Morris*, 111 N.H. 287, 289, 281 A.2d 156, 157 (1971). UPC §§ 6-103(a), -104(a) as cited in *Estate of Thompson v. Botts*, 20 Ohio Op. 3d 371, 374-75, 423 N.E.2d 90, 94 (1981). UPC § 6-104 as cited in *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex. Civ. App. 1979). UPC § 6-201 comment as cited in *Blanchette v. Blanchette*, 362 Mass. 518, 526, 287 N.E.2d 459, 464 (1972). UPC § 7-103 as cited in *Norton v. Bridges*, 712 F.2d 1156, 1162 (7th Cir. 1983). UPC § 7-205 as cited in *Mercer v. Merchants Nat'l Bank*, 112 N.H. 441, 444, 298 A.2d 736, 738 (1972). UPC § 7-302 as cited in *In re Estate of Killey*, 457 Pa. 474, 480 n.3, 326 A.2d 372, 376 n.3 (1974) (Roberts, J., concurring). UPC § 7-304 as cited in *Donovan v. Mazzola*, 716 F.2d 1226, 1236 n.6 (9th Cir. 1983).

Courts in the following cases rejected specific UPC sections: *Toman v. Svoboda*, 39 Ill. App. 3d 394, 404 n.4, 349 N.E.2d 668, 677 n.4 (1976); *Swearingen v. Giles*, 565 S.W.2d 574, 576 (Tex. Civ. App. 1978); *Dainton v. Watson*, 658 P.2d 79, 80-81 (Wyo. 1983).

ment. The approach can often be quite straightforward: look up the UPC position on point and cite it if it is favorable. The Code's comprehensiveness makes it likely that the question is addressed. Courts have noted that the Code was drafted by recognized experts and that it often either has been a part of a modern trend or has adopted the "general" rule. A Texas court put it this way: "[W]e are impressed with the fact that Sec. 2-508 has been approved by the National Commissioners on Uniform State Laws and the American Bar Association in 1969."<sup>48</sup> Strikingly similar language appears in a Kansas opinion.<sup>49</sup> Another Texas court recognized that the Code was drafted by "distinguished legal scholars."<sup>50</sup> A New Hampshire opinion cited the UPC as evidence of a trend to disregard the traditional rule that a lapsed residuary legacy passes by intestacy.<sup>51</sup> Courts in Tennessee<sup>52</sup> and Wisconsin<sup>53</sup> have cited the Code with other sec-

48. *Calloway v. Estate of Gasser*, 558 S.W.2d 571, 576 (Tex. Civ. App. 1977).

49. *Russell v. Estate of Russell*, 216 Kan. 730, 733, 534 P.2d 261, 264 (1975) ("[W]e are impressed by the fact that it [UPC § 2-508] was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1969.").

50. *Smith v. Smith*, 519 S.W.2d 152, 155 (Tex. Civ. App. 1974) ("[W]e recognize that the National Commissioners on Uniform State Laws, who drafted the Uniform Code, are distinguished legal scholars . . .").

51. *In re Frolich Estate*, 112 N.H. 320, 324-25, 295 A.2d 448, 451 (1972). *See also*, e.g., *Rogers v. Helmes*, 23 Ohio Op. 3d 301, 305 n.10, 432 N.E.2d 186, 190 n.10 (1982) (modern trend to relax the rule of testimonial necessity); *In re Morris*, 111 N.H. 287, 298, 281 A.2d 156, 157 (1971) (modern trend to permit guardians to make gifts from the estate of an incompetent); *Thom v. Bailey*, 257 Or. 572, 600 n.38, 481 P.2d 355, 368 n.38 (1971) (modern trend to grant illegitimate children inheritance rights equal to those of legitimate children).

The New Hampshire court's willingness to rely on the UPC is striking. The Code has been cited on widely varying points in six cases since 1971. *See In re Estate of Leavy*, 122 N.H. 184, 185-86, 442 A.2d 588, 589 (1982) (citing UPC § 2-606(b), favoring residuary legatees over intestate heirs); *In re Rice*, 118 N.H. 528, 531, 390 A.2d 1146, 1148 (1978) (citing UPC § 2-508, providing that a divorce coupled with a property settlement operates as a revocation of specific testamentary provisions favoring the spouse and not the entire will); *Mercer v. Merchants Nat'l Bank*, 112 N.H. 441, 444, 298 A.2d 736, 738 (1972) (citing UPC § 7-205, providing that charge of reasonable termination fee does not constitute impermissible reopening of prior accounts); *In re Frolich Estate*, 112 N.H. 320, 324-25, 295 A.2d 448, 451 (1972) (citing UPC § 2-606(b), allowing the surviving residuary legatees to share the lapsed portion of the residue); *Lunderville v. Morse*, 112 N.H. 6, 9, 287 A.2d 612, 614 (1972) (citing UPC §§ 3-801 to -804, providing that questions of form and technical exactness must give way to substance and reality); *In re Morris*, 111 N.H. 287, 289, 281 A.2d 156, 157 (1971) (citing UPC § 5-408(3), permitting guardians to make gifts from the estate of an incompetent).

52. *Warpool v. Floyd*, 524 S.W.2d 247, 249 (Tenn. 1975) (citing UPC § 2-107, which gives half bloods "the same share they would inherit if they were of the whole blood").

53. *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 332 n.8, 260



ondary authority as evidence of the general rule in a particular situation. The UPC has also served as a source of definitions.<sup>54</sup>

In some cases, the UPC has been used to support constitutional law arguments. In *Norton v. Bridges*,<sup>55</sup> the Seventh Circuit Court of Appeals held that Wisconsin could, consistent with due process, assert jurisdiction over a trustee living in Illinois because the trust had been registered in Wisconsin. Although the UPC had not been adopted in Wisconsin, the court relied upon it heavily by analogy. The court noted that "[t]he Code is framed so as to permit an exercise of jurisdiction to the full extent permitted by the Constitution"<sup>56</sup> and quoted the UPC comment that "[c]learly the trustee can be deemed to consent to jurisdiction by virtue of registration."<sup>57</sup> Thus:

[the trustee's] acceptance of the trusteeship of a trust that the settlor had registered in Wisconsin could be deemed, consistent with the Uniform Probate Code, . . . [to be] consent to the jurisdiction of the Wisconsin court. Because the constraints of due process are recognized by the Code, this analogy suggests that an assertion of jurisdiction by the Wisconsin court over the . . . trust would be constitutional.<sup>58</sup>

A similar "if the UPC does it, it must be constitutional" argument was also advanced in a Washington opinion rejecting an equal protection challenge to a statute that, like the UPC,<sup>59</sup> sets different statutes of limitations for estates with and estates without liability insurance.<sup>60</sup> Judicial respect for the drafters of the Code leads to the strong presumption that its provisions meet constitutional requirements.<sup>61</sup> Advocates facing constitu-

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N.W.2d 680, 685 n.8 (1978) (citing UPC §§ 3-803(c)(1), 3-812, 3-814 for the statement: "A secured creditor retains his rights in any security in spite of failure to file.").

54. See *Allan v. Allan*, 236 Ga. 199, 206 n.2, 223 S.E.2d 445, 451 n.2 (1976) ("interested person" includes "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding"); *Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 612, 325 N.E.2d 444, 446 (1975) (citing UPC § 1-201(4) for the proposition that a "claim" does not include a proceeding which places in issue decedent's title to specific assets).

55. 712 F.2d 1156, 1161-62 (7th Cir. 1983).

56. *Id.* at 1162.

57. *Id.* (quoting UPC § 7-103 comment).

58. *Id.*

59. UNIF. PROB. CODE § 3-803, 8 U.L.A. 354 (1983).

60. *Belancsik v. Overlake Memorial Hosp.*, 80 Wash. 2d 111, 116, 492 P.2d 219, 222 (1971) (interpreting WASH. REV. CODE § 11.40.010).

61. See e.g., *Allan v. Allan*, 236 Ga. 199, 206 nn.1-2, 223 S.E.2d 445, 451 nn.1-2

tional law arguments have benefited from consulting the UPC.

As noted earlier, a few decisions have rejected the UPC position. In the absence of clear authority on either side of the question, the Texas Court of Civil Appeals declined to follow the UPC rule that the lapsed portion of a residuary bequest goes to the surviving residuary legatees.<sup>62</sup> The court reached this result despite earlier Texas decisions expressly following the UPC rules about the effect of divorce on a will.<sup>63</sup> Sometimes a legislature's failure to adopt a UPC provision when undertaking probate reform has been read by a court as disapproval of the UPC approach. For example, in *Toman v. Svoboda*,<sup>64</sup> an Illinois widow sought to invalidate inter vivos transfers made by her husband. She argued that the UPC concept of an augmented estate should be followed.<sup>65</sup> The court acknowledged the UPC recommendation but rejected it: "We are also aware, however, that the Illinois General Assembly, in enacting the new Probate Act of 1975 . . . did not see fit to include . . . Section 2-202 . . . ."<sup>66</sup> In Wyoming, the court declined to follow the UPC rule regarding the enforceability of no-contest clauses.<sup>67</sup> The court reasoned:

[W]e . . . find additional strength for our position from the fact that our legislature has chosen not to incorporate § 3-905 of the Uniform Probate Code into the recently enacted Wyo-

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(1976) (constitutionality of a statute allowing a final judgment before notification to known or easily ascertainable "interested persons," as defined by UPC § 1-201(20)). See also UNIF. PROB. CODE § 1-201(20), 8 U.L.A. 32 (1983).

62. *Swearingen v. Giles*, 565 S.W.2d 574, 576 (Tex. Civ. App. 1978) ("Texas courts hold that the portion of a residuary bequest which lapses without words of survivorship passes by intestacy to the testatrix's heirs at law."); See UNIF. PROB. CODE § 2-606, 8 U.L.A. 146 (1983).

63. See *Calloway v. Estate of Gasser*, 558 S.W.2d 571, 576 (Tex. Civ. App. 1977) (property not passing to the former spouse because of divorce passes as if the former spouse predeceased the decedent, as in UPC § 2-508); *Smith v. Smith*, 519 S.W.2d 152, 155 (Tex. Civ. App. 1974) (legislative intent in accord with UPC § 2-508). See *supra* text accompanying notes 35-37. See also *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex. Civ. App. 1979) (citing with approval UPC § 6-104(a) as support for following the majority rule).

64. 39 Ill. App. 3d 394, 349 N.E.2d 668 (1976).

65. *Id.* at 403-04, 349 N.E.2d at 677. See UNIF. PROB. CODE § 2-202, 8 U.L.A. 75 (1983).

66. *Toman*, 39 Ill. App. 3d at 404 n.4, 349 N.E.2d at 677 n.4. But see *Taylor v. Continental Ill. Nat'l Bank & Trust Co.*, 26 Ill. App. 3d 610, 612, 325 N.E.2d 444, 446 (1975) (treating the UPC definition of "claim" as if it were in the Illinois statute).

67. *Dainton v. Watson*, 658 P.2d 79, 82 (Wyo. 1983) (although decedent's sister may have contested decedent's will with probable cause and in good faith, court forfeits sister's \$20,000 bequest pursuant to a no-contest clause).

ming Probate Code . . . . The Wyoming legislature and the committee that helped draft the new probate code were no doubt aware of the Uniform Probate Code and all of its various provisions . . . .<sup>68</sup>

The courts did not rely on explicit rejection of the UPC provision in either Illinois or Wyoming; rather, mere nonadoption of the UPC in the face of the opportunity to adopt was read as rejection.<sup>69</sup> Because the UPC has been available to legislatures for several years and because many decisions have looked favorably upon a UPC rule in the absence of legislation, it is fair to say that the general nonadoption argument has only rarely worked. As the following part of this Article indicates, however, legislative intent arguments often can be quite specific. Furthermore, when the legislative body has expressly rejected a UPC-based proposal in favor of retaining the common-law rule, one court has properly declined to follow the UPC.<sup>70</sup>

In jurisdictions that have not adopted the UPC, the Code has, nonetheless, played a role in shaping the law. Courts have been willing to consider the UPC approach as persuasive authority on a wide variety of points. However, the UPC almost certainly has been underused for this purpose. The Code's vast potential for law reform through the courts may yet be realized, as advocates become more aware that courts are willing to consider favorably arguments based on the UPC.

## *2. The UPC as an Aid in Interpreting Legislation*

The Code can be useful in interpreting local legislation in jurisdictions that have not adopted the UPC but that have considered some of its provisions. Many of the courts adopting the UPC rule did so in the context of local legislation that, because of incompleteness, did not answer the question at hand.<sup>71</sup> The focus of this part of the Article is upon judicial construction of local statutes when the legislature had considered, or even adopted, some UPC sections.

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68. *Id.*

69. See also *Estate of Liles*, 435 A.2d 379, 383 (D.C. 1981); *Green v. Potter*, 51 N.Y.2d 627, 630-31, 416 N.E.2d 1030, 1032, 435 N.Y.S.2d 695, 697 (1980) (both courts noted legislative rejection of the UPC alternative).

70. *Estate of Liles*, 435 A.2d 379, 383 (D.C. 1981) (court rejected UPC § 2-508 interpretation of relevant law, noting that the city council had considered but not adopted that section).

71. See *supra* notes 29-54 and accompanying text.

Usually, the Code's role in this context is to help define what the local legislation does *not* mean. The interpretation question has arisen when several related sections on a topic have been adopted from the UPC but a particular provision has not, and when the UPC language has been changed. In three Oregon cases,<sup>72</sup> legislative decisions to omit sections or language were read, appropriately, as rejections of the UPC rules proffered as arguments. The New York Court of Appeals took a similar approach in interpreting the New York Mental Hygiene Law as not allowing attorneys' fees to the petitioner's attorney in a conservatorship proceeding.<sup>73</sup> A different result was reached in Massachusetts, where the status of prior case law proved decisive.<sup>74</sup> The UPC specifically denies to a conservator the power to make a will for his or her ward.<sup>75</sup> Though said to be "drawn from" the UPC, a new Massachusetts statute did not cover the question.<sup>76</sup> The failure to follow the UPC's approach of prohibiting will-making by conservators might have been read as allowing such power to the conservator. Instead, the court relied on prior case law, which had interpreted an earlier statute (also without language on the point) as not allowing such power.<sup>77</sup> Despite the differences between the local statute and the UPC, interpretations of the prior statute supporting an interpretation consistent with the UPC were held unimpaired by the statutory revisions

72. *Estate of Hendrickson v. Warburton*, 276 Or. 989, 994-95, 557 P.2d 224, 227-28 (1976) ("[T]he drafters of the Code intentionally omitted provisions of the then-proposed Uniform Probate Code which would have conferred such powers upon the personal representatives of decedents' estates."); *Estate of Birch v. Oregon State Bar*, 54 Or. App. 151, 154, 634 P.2d 284, 285 (1981) (court found that OR. REV. STAT. § 126.377 was taken from the UPC, but that the legislature had deliberately deleted the words "existing" and "prior," thus changing the meaning of the section); *Estate of Phillips v. Phillips*, 23 Or. App. 363, 367 n.1, 542 P.2d 928, 930 n.1 (1975) ("Uniform Probate Code § 3-911 gives the probate court jurisdiction to partition property in which it is distributing undivided interests to heirs or devisees, but in adopting its new probate code in 1969, Oregon omitted that provision."). See also *Estate of Murphy v. Murphy*, 92 Cal. App. 3d 413, 425, 154 Cal. Rptr. 859, 867 (1979) ("[O]ur legislature . . . explicitly omitted UPC section 2-508. Thus, the . . . legislative intent was to maintain the existing case law . . .").

73. *Green v. Potter*, 51 N.Y.2d 627, 630-31, 416 N.E.2d 1030, 1032, 435 N.Y.S.2d 695, 697 (1980). But see *In re Estate of Mixter*, 83 Misc. 2d 290, 294, 372 N.Y.S.2d 296, 302 (N.Y. Surr. Ct. 1975) (partial reliance on UPC § 2-801 despite the different approach of a New York statute).

74. See *In re Jones*, 379 Mass. 826, 833-34, 401 N.E.2d 351, 356-57 (1980).

75. *Id.* at 833, 401 N.E.2d at 357.

76. UNIF. PROB. CODE § 5-407(3), 8 U.L.A. 485 (1983).

77. *In re Jones*, 379 Mass. 826, 833-34, 401 N.E.2d 351, 356-57 (1980) (citing *Shange v. Powers*, 358 Mass. 126, 260 N.E.2d 704 (1970)).

differing from the UPC.<sup>78</sup> When a legislature has used the UPC as a model, but made some changes, particular attention must be paid to committee reports, to the language changes themselves, and to the state of the case law at the time of the change.

The UPC has been used effectively by courts seeking solutions to both common-law and statutory construction problems. Judicial support for particular UPC sections should commend them to legislatures. Further, advocates ought to consider the UPC both as another well-respected source of general authority and as a guide to the meaning of particular provisions drawn from the Code. As a way of illustrating how the UPC might be used in a particular state, the next section briefly examines how legislators and advocates in Washington might benefit from consulting the Code.

#### IV. USES OF THE UPC IN WASHINGTON

The first parts of this Article have suggested that legislatures, courts, and advocates could benefit from more frequent reference to the UPC. This part briefly illustrates, by way of example, appropriate targets for reform in one state—Washington. The discussion is not intended as a comprehensive analysis of Washington law. Rather, it takes an approach that might be effectively adopted in other jurisdictions as well; it compares some of the most widely adopted UPC sections to current local law. The result in Washington is no doubt typical of what could be found throughout the country: problem-specific reference to the UPC could be useful to the legislature and to advocates preparing for litigation. After identifying some appropriate targets for statutory reform, this part illustrates how the UPC might be used by litigators in Washington.

##### *A. Potential for Piecemeal Reform*

The frequency with which other non-UPC states have consulted article II suggests that one fruitful way of identifying areas ripe for reform is to compare the most popular UPC sections to the local statute.<sup>79</sup> A selective review of the Revised Code of Washington reveals several areas in which the law could be clarified or simplified by adopting the UPC approach. To

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78. *Id.* at 832-33, 401 N.E.2d at 357.

79. *See supra* Table I, pp. 604-05.

illustrate how piecemeal reform could improve Washington law, this part examines four common sources of litigation: contracts regarding wills, advancements, the effect of divorce on a will, and common-disaster deaths.

One common source of litigation is a claim by a disappointed relative that a decedent either promised to make a will in favor of the relative<sup>80</sup> or promised not to revoke a will already made.<sup>81</sup> Because such agreements may be enforceable even though they are oral<sup>82</sup> and because a contract not to revoke is sometimes implied from a joint will,<sup>83</sup> such claims are relatively easy to make for the purpose of bargaining with the favored beneficiaries. In order to reduce the availability of such "strike suits," the UPC requires some written evidence of the contract.<sup>84</sup> The UPC approach is preferable to that currently followed in Washington since the UPC clearly allows contracts to be made regarding wills but precludes claims of agreements when the testator left no written evidence of any such intention.<sup>85</sup>

A similar problem arises in the context of advancements, and the UPC has adopted a similar solution. In Washington, an inter vivos gift to someone who becomes an intestate heir may be found to have been an advancement against the donee's share of the estate.<sup>86</sup> The problem is determining just when a transfer

80. See *Thompson v. Henderson*, 22 Wash. App. 373, 591 P.2d 784 (1979) (son did not establish as highly probable that father had orally agreed to devise entire estate to son).

81. See *Arnold v. Beckman*, 74 Wash. 2d 836, 447 P.2d 184 (1968) (testimony of drafter of wills insufficient to establish that couple agreed to make mutual wills); *Auger v. Shideler*, 23 Wash. 2d 505, 161 P.2d 200 (1945) (testimony of drafter and others sufficient to establish mutual nature of wills).

82. See *Luther v. National Bank of Commerce*, 2 Wash. 2d 470, 98 P.2d 667 (1940) (oral contract to devise and bequeath real and personal property entitled to specific performance when terms of contract can be established with reasonable certainty).

83. See T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 222-27 (2d ed. 1953).

84. UPC § 2-701 provides that such a contract "can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract." UNIF. PROB. CODE § 2-701, 8 U.L.A. 155 (1983).

85. See *Arnold v. Beckman*, 74 Wash. 2d 836, 840, 447 P.2d 184, 186 (1968). "It now appears clear and obvious that . . . some suitable mention of the testator's agreement in the wills or some independent writing containing it, would have eliminated our present problem [of determining whether there was an agreement]." *Id.* at 839, 447 P.2d at 186.

86. WASH. REV. CODE § 11.04.041 (1983) provides:

If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his

is intended as an absolute gift and when it is intended as an advancement.<sup>87</sup> In order to minimize the opportunity for other beneficiaries to reduce unfairly the share of someone who received inter vivos gifts, the UPC treats such transfers as advancements "only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement."<sup>88</sup> This approach allows persons to make advancements, but avoids the murky questions that now must be asked about a donor's intention at the time of an inter vivos transfer.

Another troublesome area has been the effect of divorce on a will benefiting a spouse.<sup>89</sup> The Washington statute follows a common approach: "A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse."<sup>90</sup> Unanswered by the statute are the questions whether the remainder of the will is interpreted as if the spouse predeceased the decedent and whether a remarriage to the former spouse will "undo" the revocation provided by the statute. Because UPC section 2-508 answers these common questions affirmatively,<sup>91</sup> its adoption would serve to clarify another area of Washington law.

The UPC's improvement upon the Uniform Simultaneous Death Act<sup>92</sup> (USDA) provides a final illustration of how piecemeal adoption of UPC provisions could be beneficial in Washington. The USDA, adopted in Washington,<sup>93</sup> determines how property will pass when "there is no sufficient evidence that persons have died otherwise than simultaneously."<sup>94</sup> The statute was designed to answer the "Now what?" question that could result in the context of a "common disaster." However, sufficient

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estate, shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed.

87. *Compare* *Holt v. Schweinler*, 71 Wash. 2d 820, 825, 430 P.2d 965, 968 (1967) (authorization by father for daughter to withdraw money from bank account constituted an advancement) *with* *Girault v. Hotaling Co.*, 7 Wash. 90, 93, 34 P. 471, 472 (1893) (money furnished to son-in-law to purchase land and construct building not an advancement).

88. UNIF. PROB. CODE § 2-110, 8 U.L.A. 69 (1983). *See also* UNIF. PROB. CODE § 2-612, 8 U.L.A. 153 (1983) (ademption by satisfaction).

89. *See supra* text accompanying notes 29-37.

90. WASH. REV. CODE § 11.12.050 (1983).

91. Under the UPC, the will is interpreted as if the former spouse had failed to survive the decedent and as if provisions revoked by the section are "revived by testator's remarriage to the former spouse." UNIF. PROB. CODE § 2-508, 8 U.L.A. 122 (1983).

92. UNIF. SIMULTANEOUS DEATH ACT, 8A U.L.A. 557-89 (1983).

93. WASH. REV. CODE §§ 11.05.010-.040 (1983).

94. *Id.* § 11.05.010.

evidence that one person survived the other, even if only for an instant,<sup>95</sup> precludes application of the statute.<sup>96</sup> In order to avoid the multiple probates and disruptions to estate plans that can result when a beneficiary survives a decedent for just a short time, the UPC effectively defines "survival" as survival by 120 hours.<sup>97</sup> The UPC's 120-hour rule is a sensible reform proposal; it both supports the policies of the current USDA and corrects inadequacies in that act.

Adoption of various UPC provisions in Washington need not involve sweeping changes in the law. The Code can serve as a model for piecemeal reform. Washington, like most states, could benefit from a careful review of the UPC with an eye to updating and clarifying particularly common problem areas.

### *B. A Source for Washington Advocates*

Part III of this Article demonstrated how the UPC has been used by courts and advocates as persuasive secondary authority for adopting a "modern" rule. Such use is open, of course, to any Washington attorney.<sup>98</sup> In addition, the UPC could prove valuable in situations in which the UPC approach and that of Washington are similar. This part of the Article discusses, again by way of illustration,<sup>99</sup> two areas in which consulting the UPC could be valuable to a Washington advocate: problems involving savings accounts and a new Washington provision permitting a will to transfer personal property identified in a separate unattested writing.

95. See *Norton v. Bonnell*, 257 Cal. App. 2d 324, 331, 65 Cal. Rptr. 139, 143 (1967) (one person survived the other by 1/150,000th of a second).

96. *Id.* at 333, 65 Cal. Rptr. at 144-45.

97. See UNIF. PROB. CODE § 2-104, 8 U.L.A. 64 (1983); UNIF. PROB. CODE § 2-601, 8 U.L.A. 128 (1983).

98. As noted earlier, one Washington opinion has cited the UPC's adoption of different statutes of limitation for estates with and estates without liability insurance as support for the proposition that Washington's similar treatment is constitutional. See *Belancsik v. Overlake Memorial Hosp.*, 80 Wash. 2d 111, 116, 492 P.2d 219, 222 (1971); see *supra* text accompanying note 60.

A similar argument might have been made in *In re Estate of Young*, 23 Wash. App. 761, 598 P.2d 7 (1979). In that case, potential will contestants challenged the adequacy of notice of a pending probate on due process grounds because the notice did not specify when and how a will contest might be initiated. In rejecting the challenge, the court might have cited UPC provisions that, like the Washington statute, make no requirement of such specificity. See UNIF. PROB. CODE §§ 1-401, 3-306(b), 3-402, 3-403, 8 U.L.A. 47, 251, 272, 274 (1983).

99. For citation to other Washington law influenced by the UPC, see Tables I and II, *supra* pp. 604-07.



Questions regarding ownership rights to savings accounts both during the lifetimes of the depositors and after the death of one depositor have plagued the courts for years.<sup>100</sup> Since 1982 Washington has had a statute designed to reduce the confusion in this area and to allow a variety of accounts that effectively avoid probate by transferring ownership at the death of one depositor.<sup>101</sup> UPC article VI, part I provides a substantially similar scheme to that in place in Washington.<sup>102</sup> The similarity in policy and approach between the UPC and the Washington statute should allow Washington judges and lawyers to consult the UPC and, in particular, its comments for help in interpreting the Washington statute.

Another problem arises when a will refers to lists of tangible personal property, usually to be written some time after the will is executed, that are intended to designate who should receive particular items. Because such lists were not in existence at the time of the will's execution, the doctrine of incorporation by reference will generally not apply to save them.<sup>103</sup> The lists are clearly for a testamentary purpose, and the doctrine of facts of nontestamentary significance will not apply.<sup>104</sup> Holding the view that a list of who takes the china cabinet and who takes the cedar chest is likely to reflect the testator's intent despite the lack of testamentary formalities, the drafters of the UPC gave effect to such lists in some circumstances.<sup>105</sup> In 1984 Washington adopted a similar, but more detailed and more restrictive, provision.<sup>106</sup> As lawyers and judges grapple with the meaning of the new section, they can look to the UPC provision and its comment for guidance.

Because in recent years both the Washington Supreme Court and the Washington Legislature have looked to the Uniform Probate Code as a model, Washington lawyers should be

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100. See *supra* text accompanying notes 38-41. For a recent typical Washington case, see *In re Estate of Oney*, 31 Wash. App. 325, 641 P.2d 725 (1982).

101. See WASH. REV. CODE § 30.22.100 (1983). The statutory scheme specifically affects six types of accounts: "(1) [a] single account; (2) [a] joint account without right of survivorship; (3) [a] joint account with right of survivorship; (4) [a]n agency account; (5) [a] trust or P.O.D. account; and (6) [a]ny compatible combination of the foregoing." *Id.* § 30.22.050.

102. See UNIF. PROB. CODE §§ 6-101 to -113, 8 U.L.A. 520-33 (1983).

103. See T. ATKINSON, *supra* note 83, at 390-91.

104. See *id.* at 394-400.

105. See UNIF. PROB. CODE § 2-513 & comment, 8 U.L.A. 126 (1983).

106. WASH. REV. CODE § 11.12.260 (Supp. 1984).

aware of the potential for using the Code as a source of argument. One of the advantages of referring to the UPC is that it provides three sources in one: the language of the Code itself, the drafters' comments, and decisions in other jurisdictions interpreting the particular provision in question. Such a rich source of information ought not to be ignored.

The final part of this Article has demonstrated, through selected Washington examples, the potential of the UPC as a source of law reform and of legal argument. In part because of the evidence that other jurisdictions have profited from such use of the Code, its utility as a source for conscientious judges, lawyers, and legislators will likely increase.

## V. CONCLUSION

The breadth of its scope, the quality of its drafting, and the reputations of its framers have given the Uniform Probate Code significant influence over the development of the law in non-UPC states. It has served as the model for numerous provisions on a wide variety of topics. Courts have used it both as a respected secondary authority and as an aid to statutory construction. Nonetheless, the Code's vast potential has been largely unrealized in Washington and elsewhere. Reformers seeking statutory solutions to particular problems should consult the UPC, buoyed by the knowledge that legislative unwillingness to adopt the Code as a whole usually has not been read as rejection of any specific proposal. Lawyers and judges should turn with confidence to the UPC for guidance.<sup>107</sup>

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107. Professor J. Rodney Johnson of the University of Richmond has suggested to the writer that many lawyers may be using the UPC as a model for drafting. Since large numbers of wills problems can be avoided with proper drafting, lawyers would be well advised to review the UPC when they revise their forms. Particularly relevant are those sections of article II that cover traditional troublespots and that have attracted favorable legislative and judicial attention.